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Natural Rights.

BY

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NATURAL RIGHTS.

NATURAL RIGHTS.

The doctrine of natural rights has a history which may be traced to the speculations of Greek philosophers and Sophists who lived in the fourth and fifth centuries before Christ; but the first deliberate adoption of it as the basis of a political organization of human society is found in the Declaration of Rights which was made and published by the representatives of the people of Virginia, assembled in convention on the twelfth day of June, 1776. This document was followed, on the fourth day of July, in the same year, by the Declaration of Independence by the United States of America, in which the assertions of the Virginian Declaration that all men possess certain inherent rights, and that government is or ought to be instituted for the common benefit, protection and security of the people, nation or community in respect of which it is established, are substantially repeated; and in the year 1789 a Declaration of the Rights of Man was adopted and promulgated by the National Assembly of France. From that time forward the doctrine has been vigorously and persistently attacked by a succession of writers in England, France and Germany with such apparrently damaging effect that Mr. Ritchie tells us in the preface to his elaborate contribution to the attempted demolition of the heresy, that when he commenced his labors in that direction he feared that he might be employed in slaying the already slain. But he adds that subsequent experience convinced him that the theory was still, in a sense, alive, or at least capable of mischief. Apparently in the judgment of Mr. Ritchie, the doctrine of natural rights has produced much mischief in the past, but a patient examination of it, as presented to us in the three documents I have mentioned, may convince us that the evil results which he would trace to its influence are not more justly attributable to it

than the crimes and follies which have been committed in the name of the Christian religion are attributable to the teachings of Christ as they are recorded in the New Testament. The earliest assailants of the doctrine in England, after it had found a place in the three documents which I have mentioned, were Bentham and Burke, the first of whom submitted it to an animated but strictly critical analysis from the point of view of the philosophical jurist in his treatise on the Principles of Legislation; while the second attacked it in his Reflections on the French Revolution with the vehement and denunciatory eloquence of a powerful orator and thinker whose vision was distorted by his anger at the progress of a revolution that ran counter to all his political sentiments and prejudices.

Bentham asserts that "rights properly so-called are the creatures of law," and by "law properly so-called," he tells us that he means "the will or command of a legislator." To this assertion he adds the declaration that "rights are established to insure the exercise of means and faculties. The right is the guarantee; the faculty is the thing guaranteed." It is therefore evident that Bentham makes an exclusive claim on the part of law and jurisprudence to the legitimate use of the word "right" as a substantive expression. But is the claim well founded? The primary meaning and use of the English word *right* and its French equivalent *droit* are adjectival; and both acquired an ethical signification, as expressing in the domain of morals a quality or characteristic which was the parallel or equivalent of that which they indicated in their original meaning of straight, when applied to material phenomena, long before they were appropriated by jurisprudence to denote a legal consequence created or recognized by positive law. It may be that jurisprudence has given to both words a much more definite and verifiable use as substantive expressions than that which they had acquired in the domain of morals, but it is beyond dispute that they were appropriated by jurisprudence on

account of their ethical associations, as it also borrowed for its own use from the domain of morals the words *duty* and *wrong*. This common use of the same vocabulary by jurisprudence and ethics is explained by the fact so well stated by Chief Justice Holmes, of Massachusetts, when he tells us that "law is the witness and external deposit of our moral life," and "its history is the history of the moral development of the race." Nor is it any wish to repudiate the historical relations of law and morals that induces Bentham and his disciples to protest against the use of the expression *natural rights* in the discussion of political questions. Their quarrel with it is a purely verbal one and will be found, when closely examined, to resolve itself into a dispute as to the correct nomenclature to be used in the investigation of the problems connected with the origin, nature and end of the state and its relations to the individual.

An illustration of the verbal character of the controversy is supplied by Bentham in his criticism of the statement that the pursuit of happiness is a natural right. "The pursuit of happiness," he says, "is certainly a natural inclination; but can it," he asks, "be declared a right?" He then immediately answers his own question by replying that whether the inclination to pursue happiness can be declared a right or not "depends on the way in which it is pursued." But before we can properly appreciate his answer it is necessary to know what he intends the pronoun *it* to stand for. Does he intend it to refer to the *inclination* to pursue happiness, or simply to the noun *happiness?* If he intends it to refer to *inclination*, as a strict observance of the rules of grammar would require, then both the question and the answer are perfectly useless to assist us in a solution of the matter in dispute, because the Virginian Declaration of Rights nor the American Declaration of Independence, which Bentham doubtless had in view, contains any statement that indicates that its authors identified natural rights with natural inclinations. On the other hand if the pronoun

it was intended to refer to the *pursuit* of happiness, then we must read the answer as meaning that whether the pursuit of happiness is a natural right or not depends on the manner in which the pursuit is conducted, and I do not believe that any rational advocate of the doctrine of natural rights would cavil at the answer in that form. But Bentham proceeds to give an illustration of the pursuit of happiness which makes it clear that he used the pronoun *it* to represent *happiness*, and by doing that he undertakes to confute the proposition that *happiness* is a natural right, which, so far as I know, does not find a place in the Virginian Declaration of Rights, nor in the American Declaration of Independence, nor in the French Declaration of the Rights of Man. "The assassin," says Bentham, "pursues his happiness, or what he esteems such, by committing assassination. Has he a right to do so? If not, why declare that he has?" It would be difficult to produce a more perfect example of controversial perversion of both the form and substance of an opponent's proposition, while preserving an apparent adherence to the language in which it is stated. In none of the three documents which have been mentioned can the assertion be found that the individual has a right to pursue his happiness in any manner he chooses, and at the expense of the happiness or existence of every other individual whose existence may interfere with the particular manner chosen for the exercise of the right and its satisfaction.

The right to pursue happiness is claimed in each of the documents for all men and in conjunction with an equally "inherent" or "inalienable" or "natural and sacred" right to life, or the enjoyment of life, or security. The assassin, therefore, cannot deprive his intended victim of life without violating the "natural" or "inherent" right of the victim to life and security; and he cannot assert the inherence of a natural right in himself to violate all or any of the inherent or natural rights of another for the purpose of more perfectly securing or enjoying his own natural right

to the pursuit of happiness without asserting that such natural right to violate the natural rights of another person is a right of a higher kind than any of the rights which may be violated in its name. But neither the Virginian nor the French Declaration of Rights, nor the American Declaration of Independence makes any mention of such a higher kind of natural right, and therefore the supporters of the doctrine of natural rights as it is proclaimed in those documents is not under any necessity to defend it against a charge of self-contradiction which cannot be supported until something is added to the doctrine which its authors never included in it. The addition which Bentham seeks to make to the doctrine, in his illustration of the assassin's pursuit of happiness, is an assertion that every natural right is absolute in each individual. This addition to the doctrine converts it into a proclamation of anarchy; and among its opponents we find the late Professor Huxley asserting that such is its true character because he regards it as a deduction or corollary from a prior doctrine of a "Law of Nature" which justifies every individual to seek the satisfaction of all his natural desires without the recognition of any ethical restrictions. But this assertion cannot be supported until the doctrine has been distorted by the gratuitous importation of a stultifying element which the advocates of the doctrine have always repudiated. Whenever the declaration is made that all men are endowed by their Creator with inalienable rights to life, liberty and the pursuit of happiness, the declaration implicitly prohibits any exclusively egoistic assertion of them by any individual which would involve the violation of them in the person of another individual. If the jurist who represents the teachings of Bentham and Austin interjects that the prohibition remains without any positive and available sanction until one is provided by the state, he is only reasserting the claims of positive law and jurisprudence to the exclusive use of the word *right* as a substantive expression; and I shall now make a

short attempt to ascertain the essential implications of the word *right* when used by law and jurisprudence in its substantive form.

The words *right*, *wrong* and *duty*, whether employed to express ethical or jural concepts, derive their meanings from reference to a standard of conduct. When used by the jurist the standard of conduct to which they refer is one prescribed by positive law, and every positive law includes a sanction by which alone legal rights arise under it, because if the law did not include a sanction the alleged right would not be enforceable, and an unenforceable right is for the analytical jurist a combination of two contradictory words. But it is the prescribed standard of conduct, and not the sanction, which determines the nature, duration and scope of the right. Positive laws which prescribe absolute duties include or have a sanction attached to them, but they do not create rights, unless we ascribe rights to the State in connection with them, and the root element of the sanction included in such laws is the arbitrary enforcement of the will of the more powerful. But the root element in the jural concept expressed by the word *right*, when it is used to designate a determinate right conferred upon an individual and enforceable by him with the aid of the State, is a restraint of the arbitrary enforcement of the will of the stronger individual who would pursue the accomplishment of his personal wishes to the detriment of the less powerful one; and the ideal of a positive law which creates determinate rights is found in a law which makes the weak and the strong equal in their power to enforce obedience to a standard of conduct prescribed for both. In other words, the supreme justification of every positive law which confers determinate rights upon individuals, when tested by the Benthamite standard of utility, is found in the fact that it provides a concrete sanction to enforce an ethical relation, and hence the vocabulary of ethics is inevitably employed to describe its results.

Burke denies that government is made in virtue of natural

rights, but admits that such rights "may and do exist in total independence of it; and exist," he says, "in much greater clearness and in a much greater degree of perfection; but their abstract perfection is their practical defect." He therefore does not pick any quarrel with the use of the phrase *natural rights*, and he is careful to announce that he recognizes the existence of what he calls "the real rights of men," and that it is in their defence he assails the "pretended rights" which in his belief would totally destroy the "real rights." But when we come to examine his account of the rights which he describes as "real," we find that he uses language which by every rule of fair and reasonable construction concedes to every member of civil society a claim upon it to secure to him all the benefits which it can confer upon him, in the particular place in which he finds himself in it. His own words are: "If civil society is made for the advantage of man, all the advantages for which it is made become his right. It is an institution of beneficence; and law itself is only beneficence acting by rule. Men have a right to live by that rule; they have a right to do justice, as between their fellows, whether their fellows are in politic function or in ordinary occupation. They have a right to the fruits of their industry; and to the means of making their industry fruitful. They have a right to the acquisitions of their parents; to the nourishment and improvement of their offspring; to instruction in life and consolation in death. Whatever each man can separately do, without trespassing upon others, he has a right to do for himself; and he has a right to a fair portion of all which society with all its combinations of skill and force can do in his favour." This list of rights is surely as large and comprehensive as the statement contained in the first paragraph of the Virginian Declaration, that men "have certain inherent rights of which when they enter into society they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty with the means

of acquiring and possessing property and pursuing and obtaining happiness and safety." The only difference between the language employed by Burke and that used by the authors of the Virginian Declaration is that Burke alleges that whenever civil society is established all the advantages for which it is made *become* the rights of its members, whereas the authors of the Virginian Declaration assert that man enters into civil society already possessed of certain rights which civil society ought to recognize and protect. But the mutual relations of the individual and civil society become the same under both propositions, because the result in each case is that every member of civil society has a claim upon it to secure him in the possession and enjoyment of certain rights or benefits. But if every member of civil society has a claim upon it to secure him in the possession and enjoyment of those rights or benefits, whence does he derive it? Burke himself uses language which seems to imply that he regards the claim as derived from something very similar to the primitive contract which was alleged by Rousseau to be the basis of the political organization of human society, for he says "men cannot enjoy the rights of an uncivil and of a civil state together. That he may obtain justice, he gives up his right of determining what it is in points the most essential to him. That he may secure some liberty, he makes a surrender in trust of the whole of it." And in his speech on *Conciliation with America*, he says, "All government, indeed, every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter. We balance inconveniences; we give and take; we remit some rights that we may enjoy others, and we choose rather to be happy citizens than subtle disputants. As we must give away some natural liberty to enjoy civil advantages; so we must sacrifice some civil liberties for the advantages to be derived from the communion and fellowship of a great empire." But if the claim of the individual

upon civil society for the protection of his person and the security of the fruits of his industry, with all the other rights which Burke concedes to him and designates as "the real rights of men," is based upon a contract or convention by which civil society was established, then the citizen is absolved from allegiance and obedience to the State when it refuses to secure such "real rights" to him, or directly invades them for the uncovenanted advantage of other members of the community. This is the pure and unadulterated doctrine of the American Declaration of Independence, and if it does not find its authority in a contractual origin of civil society, its justification must be sought in the welfare of the citizen which is alleged to be at stake and which the doctrine is invoked to protect. But the welfare of the citizen is found in his possession of the "real rights" which Burke concedes to him, and which civil society, in the circumstances supposed, has violated, and whether those rights are designated "real" or "natural" the appeal to them asserts their authority as morally prior and superior to that of the State.

It may be contended that the "real rights" of Burke ought to be designated *civil rights*, because it is only in some form of civil society that any person is found in possession of them. But if the individual is, in any circumstances, justified in resisting an attempt on the part of the State to deprive him of those rights he must in such circumstances find a designation for them which shall adequately describe their fundamental character as necessary data of civil society, rather than incidental advantages of it; and if the justification for his resistance cannot be found in a contractual origin of political society, it must be sought in the rational and moral nature of man by virtue of which political society exists. It is here that the veteran French philosopher, Renouvier, finds the source of the natural rights of man, and for that reason he designates them by the term *rational* in preference to the word *natural*, as being conditions of

well-being which the human reason demands for the development of the moral and intellectual capacities of man's nature.

Mr. Ritchie, in the preface to his book on "Natural Rights," very truly tells us that he has approached the subject in a spirit more appreciative and sympathetic than that in which either Bentham or Burke discussed it; and a re-perusal of the volume has confirmed my first opinion that it contains the materials of a perfect defence of the doctrine which it was written to confute. He tells us that the word *natural* is frequently used as the equivalent of *normal*, and that when so used it means "what ought to be, but does not necessarily exist," and he proceeds to say that, "if the term natural rights were always confessedly used in this sense, no objection could be taken to it, except that it was an ambiguous way of saying what might be less ambiguously expressed by a direct use of the term ought." But we cannot convert the word *ought* into an adjective and speak of *ought rights;* and if we select the adjective which in its daily use most directly implies the same meaning which the word "ought" used as an adjective would express, and speak of *moral rights*, Mr. Ritchie replies that "Natural rights are not identical with moral rights, because in many cases people have claimed that they have a moral right to do things that were not recognized either by the law of the land, or by prevalent public opinion, or by the conscience of the average individual" (p. 80). On the next page (81) of his book Mr. Ritchie says that if we could agree upon what rights every society ought at the very least to guarantee to its members, they would be our "natural rights." In making this statement he places the term "natural rights" in inverted commas, by which I suppose he intends it to be understood that even in that case the adjective *natural* could be properly used only as a provisional or adventitious expression.

He then proceeds to inquire what determines the

"ought," and he concludes that it is "social utility" as disclosed by past history. In this connection it may be noted that in his previous discussion of the subject in his book on the "Principles of State Interference," Mr. Ritchie has been careful to remind us, that organized society is something more than a simple aggregate or number of separate individuals and that "the person is a product of the State." Also in his book on "Natural Rights" he tells us that, "Nature made man an animal; society has made him a rational animal—a thinking, intelligent being capable of moral action," and that "the person with rights and duties is the product of society, and the rights of the individual must, therefore, be judged from the point of view of society as a whole and not the society from the point of view of the individual." All this may be admitted unreservedly, but it does not prove the existence of any "social utility" apart from the well being of the units composing a community; and not only is the person "the product of the State," but the supreme "utility" of the state is to produce "persons," that is "thinking," intelligent beings capable of moral action." But the "thinking, intelligent being capable of moral action" is such because he is capable of comprehending moral distinctions; and if the end of the State is to enable men to live a truly human life, that is, the life of rational creatures whose conduct is regulated by moral distinctions, the ultimate justification of its existence must be ethical, and, therefore, the political philosopher who discusses the functions and ends of the State has an equal, if not a prior, claim to the jurist to use the vocabulary of ethics in the data of the problem he is examining. The use of the expression "natural rights" for this purpose has been well vindicated by Professor Green in his lectures on the "Principles of Political Obligation" (Works volume 2, page 339) where he says, "There is a system of rights and obligations which should be maintained by law, whether it is or not, and which may be called "natural," not in the

sense in which the term "natural" would imply that such a system ever did exist, or could exist, independently of force organized by society over individuals, but natural because necessary to the end which it is the vocation of human society to realize." Mr. Ritchie himself has told us that "If there are certain mutual claims which cannot be ignored without detriment to the well-being and, in the last resort, to the very being of a community, these claims may in an intelligible sense be called fundamental or natural rights. They represent the minimum of security and advantage which a community must guarantee to its members at the risk of going to pieces if it does not with some degree of efficiency maintain them" (page 87). If I rightly comprehend the scope of these words they embody the same fundamental principle which is asserted in the third paragraph of the Virginian Declaration of Rights which states "That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and that when a government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal." The Virginian proposition is certainly stated in much wider terms than those in which Mr. Ritchie has expressed his conception of the fundamental relations of the individual and the State to one another; but the substance of each is that the justification of the existence and action of the State is the provision and maintenance of certain conditions of well being to all its members. The same doctrine is expressed with slight change of language in the American Declaration of Independence. The argument in both documents is undoubtedly based upon the social contract theory of the eighteenth century, but the proposition that the utility and justification of the political organization of society are found in the protection of the individual in the

possession and enjoyment of certain conditions of welfare which being, in the language of Green, "necessary to the end which it is the vocation of human society to realize" may, therefore, be properly described as "natural rights," is independent of any theory of the historical origin of the State with which it may at any time have been associated, and is always separable from it.

In view of many passages in Mr. Ritchie's book it would seem that the verbal aspect of the controversy might be reduced to a choice between the words "natural" and "necessary." But if the word "necessary" is admitted to be a legitimate description of the alleged rights, it will be difficult to justify the scorn and vehemence with which the use of the word "natural" has been condemned when applied to them. The words "natural" and "necessary" are not logically or etymologically identical, but they are nevertheless frequently used as if they were so. For example, we frequently find such expressions as "natural consequence" and "necessary consequence" used interchangeably in exactly similar connections, and it cannot be disputed that many relations and results in the material universe and in the world of human activity may be correctly described as both "natural" and "necessary." It would therefore seem to be a perfectly defensible use of the word "natural" in connection with social relations to apply it to those conditions of human well being which are necessary to the permanence and efficiency of human society.

Both logically and historically civil society finds its foundation in the rational and moral nature and capacities of men, and the final test of its claim to exercise authority over the individual is ethical. For this reason neither law nor politics can avoid the use of the vocabulary of ethics; and the political philosopher may fairly claim to use the expression "natural rights" to designate that sphere of personal action which must be held inviolate from the coercive intrusion of any other individual or the State in order to permit every man

to live the most truly human life which his nature and his capacities make possible for him in the social environment in which he is found. The fact that the extent of this sphere of personal action has been, and may continue to be, the subject of an interminable controversy does not prove that such a sphere of personal action does not exist; and the advocate of the doctrine of natural rights may readily admit that its extent may vary in relation to the moral and intellectual development of the individual. The sphere of personal action which ought to be preserved for a child or to an adult with a defective mental equipment is not the same as that which ought to be maintained inviolate for the adult possessed of intellectual and moral capacities equal to those possessed by the bulk of the members of the same community; but in each case the natural rights of the individual are violated if the sphere of personal activity is restricted to a degree which prevents him attaining the standard of human excellence which otherwise he might reach. Finally, if I am asked to prescribe a test for any alleged condition of well being which may at any time be claimed by the members of a particular community as their natural right, I reply that the test is the necessity of such alleged natural right for the preservation and protection of the standard of well being to which the claimants have already attained, or for the attainment of any manifestly practicable increase of their well being which the alleged right would bring within their reach. Every such condition of well being may be properly designated a *right* because it *ought* to be possessed by the claimants, and it may be properly called *natural* in the sense that the evolution of human excellence for the continuance of which the right is necessary may be declared to be natural to man; and it is when the alleged natural rights which are specified in the Virginian Declaration of Rights and in the American Declaration of Independence are regarded in this aspect of them that we find the justification of the words of Washington when he described the troops

who had fought under his command for the independence of their country as men "who had assisted in protecting the rights of human nature." If human nature has not any natural or inherent rights which can claim recognition to restrain a preponderance of physical force or the arbitrary will of majorities, then the weak and all minorities are without verifiable authority or justification for resisting oppression. Might is the ultimate foundation and criterion of right and the highest political ideal men can safely cherish is the rule of the benevolent despot. Are we prepared to accept this conclusion as the final goal of all the efforts and struggles which humanity has made and endured to reach the best possible conditions of human well being? If not, we must continue to carry on the good fight under the old flag which was borne aloft by the men who stormed the citadels of despotism and privilege in the past and on which is written as the record of its history and the promise of its future service "*In hoc signo vinces.*"

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